

NO. 47408-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON RUZICKA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorensen

No. 14-1-00224-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly prohibit defendant from contact with his children when defendant's children are in the same class of individuals victimized by defendant and the no-contact order was reasonably necessary to prevent harm to defendant's children?

B. STATEMENT OF THE CASE.

On January 16, 2014, the Pierce County Prosecutor's Office (State) charged Jason Jon Ruzicka (defendant) with one count of rape of a child in the third degree. CP 1. Following trial, a jury returned a guilty verdict for the count as charged. CP 26. The Department of Corrections (DOC) conducted a pre-sentencing investigation in which it was recommended that defendant have no contact with any minors. CP 27-45. On March 6, 2015, defendant was sentenced to a standard range sentence and ordered to follow the conditions as recommended in the pre-sentencing investigation. CP 63-65; 3/6/15 RP 23. At sentencing, the trial court set a hearing regarding the no contact order prohibiting defendant's contact with his children. 3/6/15 RP 25. The judge stated that he was, "not interested in separating him (defendant) from his family unless that's absolutely necessary." *Id.*

On March 27, 2015, the trial court heard arguments on defendant's motion to modify the condition of no contact with minors to allow defendant to have contact with his children. 3/27/14 RP 3-19. After hearing arguments from both parties, including several witnesses for the defendant, the court denied defendant's motion to modify the no contact conditions. CP 70. The court indicated it would reconsider defendant's motion if defendant obtains a psychosexual evaluation. CP 70; 3/27/15 RP 19. There is nothing in the record that indicates a psychosexual evaluation has been done or that this matter has been brought back to the trial court.

Defendant filed a timely notice of appeal on April 2, 2015. CP 71.

The information the court had about defendant's offenses came from the trial which showed the following:

Defendant was convicted for an incident which occurred during the period between May 1, 2011 and September 30, 2011, when the victim (J.K.) was 14 years old. 12/9 & 12/10/15 RP 67-8. J.K. visited defendant's house frequently to "hang out" with her (J.K.'s) cousin and defendant's children. CP 2; 12/9 & 12/10/14 RP 67. J.K. knows the defendant through her family. *Id.* at 66. J.K. testified at trial that she was given alcohol by defendant and his longtime girlfriend, Andrea, while at their home on the day of the incident. *Id.* at 71. In describing the incident at trial, J.K. testified that defendant told her (J.K.) to go to the trailer by his house and

when J.K. got there, defendant started touching her around the hip area. *Id.* at 73. Defendant took off J.K.'s pants and licked her "private area." *Id.*

The State introduced testimony at trial regarding a separate incident involving defendant during the summer of 2011. 12/11/15 RP 51. Defendant pleaded guilty to assault in the third degree and communication with a minor for immoral purposes as a result of that incident. 12/11/15 RP 55-56. The victim in that case was a sixteen year old, developmentally delayed girl (C.L.) who was staying the night at defendant's house with her god sister and half sister. 12/9 & 12/10/15 RP 145-46; 5. C.L. testified at trial in this case that defendant came into the bed (on which she was lying), pulled her pants down, and licked her vagina. *Id.* at 149.

When interviewed by Detective Michael Malave regarding the incident with C.L., defendant stated he was intoxicated when he came into C.L.'s room and thought that C.L. was someone else. 12/11/15 RP 49-53.

Community Corrections Officer Joe Sofia presented reasons the DOC was opposed to defendant having any contact with minors, including his (defendant's) own children during the hearing for the motion to modify the no contact order. 3/27/15 RP 16-17. Mr. Sofia stated the defendant "evidently had mistaken the victim for his wife while intoxicated," and expressed concern that this could happen again to a young girl or even defendant's own daughter. 3/27/15 RP 17. The DOC report prepared by

Mr. Sofia details the concern that there is a constant pattern to defendant's association with young girls. CP 68. The first victim was 16 years old and developmentally disabled. *Id.* Defendant's daughter is 16 years old and about the same age as both victims; defendant's son is 12 years old. *Id.* Defendant began dating his current girlfriend when she was 16 years old. *Id.* Mr. Sofia stated during the hearing that no contact with any minors is the right thing to do until and unless a psychosexual evaluation shows otherwise. 3/27/15 RP 17.

The trial court, in upholding the no contact order, pointed out the concern that defendant's children are a lure for other kids to be at the house. *Id.* at 19.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY PROHIBITED CONTACT WITH DEFENDANT'S CHILDREN BECAUSE THEY ARE IN THE SAME CLASS OF INDIVIDUALS DEFENDANT VICTIMIZED AND THE NO-CONTACT ORDER WAS REASONABLY NECESSARY TO PREVENT HARM TO THE CHILDREN.

A court may order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals" and to "[c]omply with any crime-related prohibitions" as conditions of community custody. RCW 9.94A.703(3)(b); (e). The imposition of crime-

related prohibitions is reviewed for an abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). Traditionally, a crime-related prohibition has been left to the discretion of the judge and will only be reversed if it is “manifestly unreasonable” such that “no reasonable man would take the view adopted by the trial court.” *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

The right to parent is a fundamental right which may be limited when it is “reasonably necessary to accomplish the needs of the state.” *State v. Ancira*, 107 Wn. App. at 653-54. Preventing harm to children is a compelling state interest sufficient to limit the fundamental right to parent by a condition of a criminal sentence. *Id.* The trial court can restrict the fundamental right to parent if it is reasonably necessary to protect children. *State v. Corbett*, 158 Wn. App. 576, 598, 242 P.3d 52 (2010). In assessing what is reasonably necessary, the balance between sentencing conditions and fundamental rights is a delicate and fact-specific analysis. *In re Personal Restraint of Rainey*, 168 Wn.2d 367, 377, 229 P.3d 686 (2010).

In *State v. Corbett*, the court of appeals held that the limitations on Corbett’s right to parent was reasonably necessary to protect his two sons and the no-contact order limiting contact with them was directly related to

the crime because Corbett's sons fell within the class of persons Corbett victimized. *State v. Corbett*, 158 Wn. App. 576, 599-601, 242 P.3d 52 (2010). In that case, Corbett was convicted of sexually abusing his six-year-old stepdaughter. The trial court imposed a sentencing condition prohibiting contact with Corbett's ten and fourteen-year-old sons, which Corbett challenged as an invalid crime-related prohibition. The court found that the prohibition was crime-related and reasonably necessary because Corbett abused "parental trust to satisfy his own prurient desires" thereby placing his sons at risk to be victimized. *Id.* at 601. The court in that case also relied on our state's domestic relation laws which allow, under RCW 26.09.191(2)(a), for a parent's residential time to be limited if the parent engages in certain behavior such as sexual abuse. *Corbett*, 158 Wn. App. at 601. The court found that a criminal trial court could similarly consider sexual abuse of a child to justify limiting contact with one's own children and held that it was not an abuse of discretion for a trial court to do so. *Id.* at 601.

In *State v. Warren*, the Washington Supreme Court held that an order prohibiting contact with Warren's wife did not violate his fundamental right to marry when his victims were his eight-year-old and fourteen-year-old stepdaughters because the condition was reasonably necessary to protect his wife and her daughters. *State v. Warren*, 165

Wn.2d 17, 34, 195 P.3d 940 (2008). The trial court in that case issued a condition of sentence prohibiting contact with Warren's wife, who was not the victim of the crime, when Warren was convicted of child molestation and rape of a child. Warren challenged the condition as not reasonably crime-related and asserted it violated a fundamental right to marriage. The Supreme Court acknowledged that the rights to marriage are fundamental constitutional rights but found that the order prohibiting contact with Warren's wife was reasonably necessary to achieve the compelling state interest of protecting her as well as her daughters. *Id.* The Court relied on the unique facts of the case—his wife is the mother of the victims; Warren tried to induce his wife not to cooperate with the prosecution of the crime—in holding that preventing all contact with his wife was not an unconstitutional restriction on Warren's constitutional rights. ***Warren***, 165 Wn.2d at 34-35.

In ***In re Rainey***, the Washington Supreme Court held the sentencing court did not abuse its discretion in prohibiting any contact with his daughter when Rainey was convicted of harassing his wife and kidnapping his daughter¹. ***Rainey***, 168 Wn.2d at 692. In that case, Rainey

¹ The Court in *Rainey* remanded for the purpose of assessing the duration of the lifetime no-contact order; it held that the scope of the no-contact order was valid. Duration in the present case has not been set pending a psychosexual evaluation and therefore is not addressed as an issue at this time.

used his daughter as leverage to harass and harm his ex-wife by making unsubstantiated child-abuse claims, refusing to return the child from visitation, kidnapping the child, and sending letters to the child post-arrest blaming his ex-wife. The Court relied in part on its holding in *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (holding a sentencing condition may prohibit access to the means or medium through which a defendant committed a crime) in finding the no-contact order for his daughter was reasonably necessary to prevent harm to his wife because his daughter was a means through which Rainey harassed his wife. *Rainey*, 168 Wn.2d at 691-92.

In *State v. Ancira*, the court of appeals held the condition of sentencing prohibiting Ancira from having any contact with his own children was not reasonably necessary to protect them when Ancira was convicted of violating a no-contact order requiring him to stay away from his wife. *Ancira*, 107 Wn. App. at 654. The trial court prohibited Ancira from having contact with his children to protect them from witnessing domestic violence against his wife. The appellate court in that case found there was no evidence to explain why prohibiting Ancira from contacting his wife was insufficient to protect the children from the harm of witnessing violence between their parents. *Id.* at 654-55. The no-contact order for Ancira's wife served the state interest of protecting the children

from the harm specified in that case; prohibiting contact with his children was not reasonably necessary. *Id.* at 655. The court also relied on the fact that there was a pending marital dissolution between Ancira and his wife in finding that the matter in that case would be best resolved by the family court in the dissolution proceeding rather than as a sentencing condition. *Id.* at 656-57.

The present case is similar to *State v. Corbett*. As in *Corbett* where Corbett's ten and fourteen year old sons were found to be in the same class of individuals as his six-year-old victim, defendant's children are in the same class of individuals victimized by defendant. Defendant's children are a twelve-year-old boy and a sixteen-year-old girl. CP 68. His victims are a sixteen-year-old girl and a fourteen-year-old girl or just about the same age as his victims at the time of the incidents. Defendant has a pattern with teenage girls; in addition to his victims, he began dating his current girlfriend when she was only sixteen years old and he was roughly twenty-one years old. CP 68.

Also similar to *Corbett*, defendant was in a position of trust which he abused. In *Corbett*, the defendant used his position of trust in a parenting role making his stepdaughter vulnerable to abuse. In this case, defendant was a family friend whose house was a frequent gathering place for the victims and their families. 12/9 & 12/10/14 RP 66; 125.

Defendant's victims were both vulnerable; J.K. had been drinking alcohol provided by defendant at the time of the incident (12/9 & 12/10/14 RP 70-71) and C.L. is developmentally delayed. 12/9 & 12/10/14 RP 5. The victims in this case were vulnerable, invited guests; defendant took advantage of their vulnerability and trust to satisfy his own deviant, sexual desires. Defendant's children are in specified class of individuals as his victims by their age and defendant's position of trust.

The present case is equally similar to *State v. Warren*. As in *Warren*, although defendant's children are not the victims of his crime, the unique facts of this case make prohibiting contact with defendant's children reasonably necessary to protect them. Here, defendant stated he was intoxicated during at least one of the incidents and mistook the victim for his girlfriend. 12/11/15 RP 52; CP 68. His victims were staying the night at his house when defendant victimized them. 12/9 & 12/10/14 RP 70; 148. Defendant assaulted one victim, C.L. while she was sleeping in the same room with her god sister. 12/9 & 12/10/14 RP 149. As stated previously, the victims were both vulnerable. 12/9 & 12/10/14 RP 5; 70-71. Finally, defendant has a constant pattern with regards to young girls. CP 68. Taking all of these facts together, a reasonable person would adopt the view of the court and find that prohibiting contact with all children,

including defendant's own children, is reasonably necessary to prevent harm to them.

Defendant's children are a means through which defendant committed his crimes similarly to *In re Rainey*. Both victims testified that they were at defendant's house with his children. 12/9 & 12/10/14 RP 67; 149. J.K. testified that she "hangs out" with defendant's children frequently. *Id.* at 67. C.L.'s sister was sleeping in defendant's son's room the night she was victimized. *Id.* at 149. Defendant's children have their friends over to visit. 3/27/15 RP 15. Not only is a prohibition on contact with defendant's children prudent for their own safety but also for the safety of the other children that frequently visit.

The court, in deciding to maintain the no-contact order at least until a psychosexual evaluation was done, expressed concern that defendant's children are a lure for other kids to be at the house that is a known party house and where the two incidents happened. 3/27/15 RP. It is based on these concerns that the trial court exercised its discretion to prohibit contact as a reasonably necessary means to accomplish the compelling ends of preventing harm to children.

Defendant cites *State v. Ancira* in support of his position; however, the present case is distinguished from *Ancira*. Unlike in *Ancira*, where there was a reasonable alternative, the no-contact order for Ancira's

wife, that would sufficiently protect the children from the harm in that case—witnessing domestic violence— here, there is not a reasonable alternative that would eliminate the risk of defendant sexually abusing his children or from using his children to lure additional victims. Defendant could continue to lure victims through indirect contact with his children, such as phone calls. The no-contact order against any contact with defendant’s children pending the psychosexual evaluation is reasonably necessary to prevent harm to his children and their invited guests.

The trial court carefully reviewed the facts of this case in using its discretion to prohibit contact with defendant’s children. The trial court was explicit about not wanting to separate defendant from his family unless it was absolutely necessary. 3/6/15 RP 25. Only after hearing arguments from defendant and witnesses on his behalf, as well as from the CCO and prosecution, did the trial court maintain the no-contact order prohibiting defendant from contact with his children. Based on the information the trial court had, it chose to err on the side of safety for the children. The court indicated its willingness to reassess the order after a psychosexual evaluation is obtained by defendant. The no-contact order in this case is necessary to prevent defendant’s children from becoming his victims; therefore, it should be upheld.

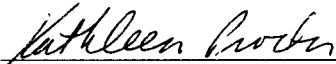
D. CONCLUSION.

The trial court did not abuse its discretion in carefully reviewing the facts of the case and determining that it is reasonably necessary to prohibit contact between defendant and his children to achieve the compelling state interest of protecting the children.

For the foregoing reasons, the state respectfully asks this court to affirm the order below.

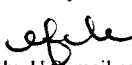
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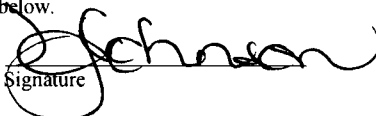
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